



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 5563
Kirk Shelmerdine Racing LLC)

STATEMENT OF REASONS OF COMMISSIONER DAVID M. MASON

The matter involves a company owned by Kirk Shelmerdine, a driver in the National Association of Stock Car Auto Racing ("NASCAR"), and arises from a complaint filed by Sydnor Thompson, of Charlotte, N. C., regarding express advocacy on a stock car. Commissioner Smith, along with then-Vice Chairman Toner, has ably summarized the facts, and they need no repeating here. See *In re Kirk Shelmerdine Racing LLC*, Matter Under Review ("MUR") 5563, Statement of Reasons ("SOR") of Comm'r Smith and Vice Chairman Toner at 1-2 (F.E.C. Aug. 8, 2005).¹

The Office of General Counsel ("OGC") analyzed the applicable law and the costs involved in this matter, and recommended that the Commission adopt a conciliation agreement with Respondent Kirk Shelmerdine Racing LLC, including a civil penalty.² Although the OGC legal analysis is correct and the cost method is reasonable, conciliation is neither necessary nor appropriate in these circumstances.

First, Shelmerdine and his company are now aware of the implications of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, for their activity and will not repeat it. Neither a conciliation agreement nor a civil penalty will additionally deter them or others similarly situated. Cf. *In re Morton* ("Muleshoe"), MUR 5136, SOR of Comm'r Wold at 4 (F.E.C. March 22, 2002) (dismissing a matter where, *inter alia*, no substantial purpose of FECA, including deterrence of corruption, was implicated by activity at a particular level).

Second, the dollar value of the violation as calculated by OGC is \$14,000.³ This is within a few hundred dollars of a recent matter dismissed without investigation at OGC's

¹ Unlike my colleagues, I supported an RTB finding in this matter because the value of the advertisements at issue could not be determined without an investigation.

² See General Counsel's Report # 2 at 2-6 (F.E.C. July 21, 2006).

³ See *id.* at 1-2.

request. *See In re Gallagher*, MUR 5651, SOR of Vice Chairman Toner & Comm'rs Mason & von Spakovsky at 1 (F.E.C. Sept. 25, 2006). While there are many factual and legal differences between the two matters, *Shelmerdine* is less problematic than *Gallagher* factually and legally. Unlike *Gallagher*, *see id.* at 1-3, this matter involved no presidential campaign, no political-party committee, and no coordination. Moreover, *Gallagher* involved activity by an organization, *see id.*, while this matter involved activity by an individual.

Third, the recommended civil penalty⁴ is not far above the level that the Commission for many years has used as a cutoff, below which conciliation is not worthwhile. This indicates that the combination of the dollar value and substantive seriousness of the violation puts this matter at the margin of our enforcement priorities.

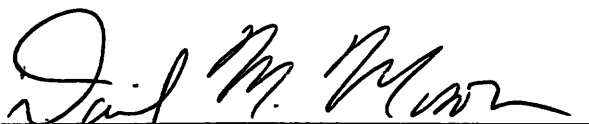
Fourth, Respondent Kirk Shelmerdine Racing LLP is owned exclusively by Shelmerdine himself, the operation is not large, and Shelmerdine appears to have lacked knowledge of FECA. While a corporate or union violation is usually more serious than an individual one, here the individual and the corporation are essentially the same person. *See In re Jones*, MUR 5662/ADR 303, Recommendation to Approve Settlement Agreement (F.E.C. Jan. 23, 2006); *id.* Certification (F.E.C. March 21, 2006) (rejecting a settlement agreement where an independent-expenditure newspaper ad lacked a disclaimer and the respondent, who was not familiar with FECA, did not report the independent expenditure to the Commission); *In re Issa*, MUR 5367, General Counsel's Report #2 at 3-4 (Oct. 27, 2005) (dismissing a matter where a corporation that made donations regarding a state recall initiative was owned exclusively by the respondent).

Fifth, Respondent ceased the FECA violation upon receipt of the complaint and acknowledged the violation during the Commission's investigation. Moreover, the violation was unintentional, and Shelmerdine will not commit the violation again. *See In re Friends of Larry Pressler*, MUR 4795, Resp. to Compl. at 1 (Sept. 28, 1998) (exercising prosecutorial discretion where the candidate would not run again).

Sixth, this matter, and a recent matter involving race cars make the law clear. *See In re Con-Diaz Champion Racing*, SOR of Chairman Thomas, Vice Chairman Toner & Comm'rs Mason, McDonald & Weintraub at 1-2 (F.E.C. March 11, 2005).

For the foregoing reasons, a letter of admonishment that places the Commission's legal interpretation on the record was an appropriate resolution in this matter. *See id.* Certification (Jan. 11, 2005) (issuing an admonishment letter).

October 16, 2006



David M. Mason
Commissioner

⁴ *Id.* at 6.

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